

7/22/93

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of)
) Docket No. FIFRA-92-H-04
Metrex Research Corporation,)
)
Respondent.)

Second Order On Motions

Pursuant to a telephone conference call held with counsel on July 21, 1993, this matter has been set for hearing on October 18, 1993. The parties were given until August 27, 1993, to file any motions, but with the caveat that absent a showing of unusual circumstances, no motion would be considered if it would delay the hearing.

Each party has filed four motions - eight in all. For the reasons set forth below, the motions are disposed of as follows:

Metrex's motion to dismiss for lack of jurisdiction: Denied.

The motion is directed to the fact that the issue of the validity of the test data is common to both this proceeding and the proceeding in the United States District Court. No issues of substance have been raised which were not covered in my first order.

The court's findings with respect to the validity of the test data were tentative findings made upon a limited record in connection with its grant of a preliminary injunction against the

EPA's publication of the test data and their results. They were not final findings on the validity of the tests. They cannot, therefore, operate as collateral estoppel or res judicata.

In determining whether to stay this proceeding, it is appropriate to refer to the law on primary jurisdiction to determine whether and to what extent it would apply. For the reasons stated in my previous order, the doctrine does apply in favor of not granting a stay. None of the cases cited by Metrex hold to the contrary.

Metrex's motion to seal the record and close the proceedings: Denied.

The EPA's adjudicative proceedings are public proceedings, except to the extent that the disclosure of trade secrets or other protected commercial or financial information is involved.¹ Metrex is not seeking protection against the disclosure of commercial or financial information but against the harm it perceives from the fact that the proceeding itself and the papers in it are open to the public. Metrex has not shown that the harm it allegedly might suffer outweighs the EPA's policy favoring public over secret proceedings.²

¹ See 40 C.F.R. 2.101(b) ("All EPA records shall be available to the public unless they are exempt from the disclosure requirements of 5 U.S.C. 552."); 40 C.F.R. 22.09 ("Subject to the provisions of law restricting the public disclosure of confidential information, any person may, during Agency business hours inspect and copy any documents filed in any proceeding.")

² See 40 C.F.R. 2.101(a); cf., FCC v Schreiber, 381 U.S. 279 (1965) (upholding procedural rule of FCC requiring public proceedings except where it is shown that the public interest, the dispatch of business or the ends of justice would be served by

Metrex's motion for reconsideration of order of discovery: Denied.

The possibility that Metrex might obtain evidence from Mr. Ulatowski, Dr. Lin, Ms. Springthorpe or Dr. Sattar impeaching the AOAC Sporidical Test does not justify taking their depositions.³

Metrex's motion for leave to amend its witness and exhibit list: Granted with respect to adding James Danielson, Everett Greer and Dallas P. Wright, Jr.; denied as to adding Mr. Ulatowski, Dr. Lin, Dr. Sattar and Ms. Springthorpe.

Danielson, Greer and Wright participated in the testing at issue in this case. Consequently, their testimony is relevant. Adding these witnesses should not delay the hearing, since their depositions have been ordered.

Ulatowski, Lin, Sattar and Springthorpe are being added as adverse witnesses. Ulatowski and Lin are asserted to be FDA experts on the AOAC Sporidical Test. Sattar and Springthorpe are asserted to be EPA experts on the AOAC Sporidical Test. Attempting by what will be really cross-examination to gain admissions from these witnesses that the test is deficient in some respects may elicit evidence of some corroborative value. The possible value, however, is outweighed by the lengthy cross-examination which is indicated and by the risk of injecting collateral issues with respect to the AOAC Sporidical Test, not really germane to the issue of whether the tests in this proceeding support the EPA's complaint. If it

nonpublic sessions.)

³ See 40 C.F.R. 22.19(f).

does appear at the hearing that any of these witnesses have relevant and material information, Metrex may move to have that witness called.

The specific exhibits Metrex wants to add to its exhibit list have yet to be identified. Ruling on the admissibility of these exhibits, including objections based on relevancy and prejudice to the EPA, will be deferred until they are identified or offered in into evidence.

The EPA's motion to amend the complaint: Denied, except that the motion to include the express allegation that Metrex is a corporation in Par. 1, and to correct the Coldspoor EPA Registration number is granted.

The EPA seeks to amend the complaint to allege additional sales or distribution of the products at issue. The effect is to increase the penalty. At this stage of the proceeding, the risk that these amendments will lead to further delays in the proceeding outweighs the reasons for seeking an increase in penalty. The usefulness of a penalty as a deterrent cannot be overlooked. Nevertheless, an already sizable penalty is being requested to which should be added the deterrent effect of the finding, if justified by the record, that the product is ineffective

The EPA's motion for a partial accelerated decision: Denied.

If the facts on which the EPA has moved for an impartial accelerated decision are not in dispute, as alleged by the EPA, it would appear that they are the kind of facts that can be disposed of by a stipulation of facts. Since there is going to be a hearing,

no useful purpose would be served by attempting to fragmentize the issues at this point.

The EPA's motion to strike witnesses and exhibits: Denied.

The fact that Metrex has listed more than one witness to testify on an issue does not mean that Metrex will call all witnesses to testify. It is Metrex's choice to decide which witnesses to call, and not the EPA's. Even if Metrex should decide to call all its listed witnesses, the EPA has not shown that the testimony of some would be merely redundant of testimony given by the others. The exclusion of unnecessarily repetitive testimony can be handled by appropriate objection at the hearing.

It is not clear that testimony on good laboratory practices is irrelevant. The testimony should be heard before it is evaluated and the arguments made by the EPA are more appropriately considered in the post-hearing briefs.

The testimony of Juanita Wills, Michael Walker, Marged Harris, Robert Perlis and Andrew Cherry is irrelevant if it is directed to Metrex's defense of estoppel and unclean hands, which was stricken by my previous order. Whether or not these witnesses have relevant testimony on the issue of the validity of the tests is to be determined when the witnesses are called.

The relevancy and materiality of the exhibits will be determined when the exhibits are offered rather than attempting to anticipate their admissibility at this point.

The EPA's motion to amend the prehearing exchange: Decision on this motion is deferred. The additional witnesses Beloian, Gowda,

Twohy, Olson and Bolander were directly involved with the tests relied upon by the EPA in this proceeding. They may well furnish evidence that should be considered, even though adding them as witnesses would mean a delay in the hearing. Metrex has yet to reply to this motion, but Metrex's counsel did state at a telephone conference held on September 21, 1993, that Metrex will oppose the motion. The motion should not be ruled upon without giving Metrex the opportunity to be heard.

Counsel for Metrex need not reply to those motions by the EPA which have been denied without waiting for Metrex's reply, unless he desires to put his reply on the record.



Gerald Harwood
Senior Administrative Law Judge

Dated: Sept 22 1993

CERTIFICATE OF SERVICE

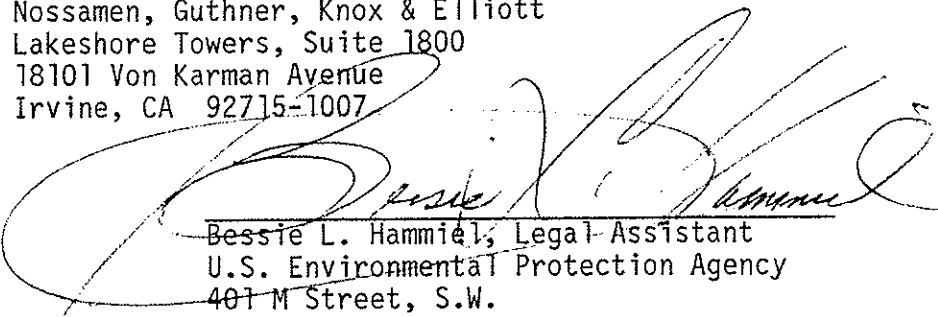
I do hereby certify that the foregoing Second Order On Motions
was filed in re Metrex Research Corporation; Docket No. FIFRA-92-H-04
and copies of the same were mailed to the following as indicated below:

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Dated: Sept. 22, 1993